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No. 94-1128

In the Supreme Court of the United States

OCTOBER TERM, 1994

FLORIDA CELLULAR MOBIL COMMUNICATIONS CORPORATION, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Communications Commission reasonably adhered, on the facts of this case, to its general policy of strict enforcement of the rules governing applications for licenses to provide cellular communications services in rural areas.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 28 F.3d 191. The Federal Communications Commission's final order (Pet. App. 18a-23a) is reported at 7 F.C.C.R. 7856. A prior Commission order (Pet. App. 24a-28a) is reported at 6 F.C.C.R. 6910, and the decision of the Commission's Mobile Services Division (Pet. App. 29a-33a) is reported at 6 F.C.C.R. 354.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1994. Pet. App. 36a. A petition for rehearing was denied on September 28, 1994. Pet. App. 34a, 35a. The petition for a writ of certiorari was filed on December 27, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Communications Commission licenses private parties to construct and operate cellular communications systems in various service areas defined by the Commission. Pet. App. 2a. In order to streamline the licensing process and provide cellular services to the public as quickly as possible, the Commission generally awards licenses through a lottery process. *Id.* at 3a; see, *e.g.*, *Rural Cellular Service Rules*, 60 Rad. Reg. 2d (P & F) 1029, 1037 (1986). Each facially complete application for a particular service area is included in the lottery, and the Commission does not review the applications until the lottery has produced a tentative winner. At that point, the Commission reviews the selected application to determine whether it complies fully with the Commission's rules and regulations. If it does not, it will be dismissed. If it appears to comply, the Commission gives public notice of the tentative selection, and competing applicants then have the opportunity to challenge the result by filing petitions to deny the application. Pet. App. 3a-4a.

In its initial rules, which governed applications to serve metropolitan service areas, the Commission prohibited direct or indirect cross-ownership among license applicants, but ignored any interest of less than

one percent in any applicant. Pet. App. 2a; see 47 C.F.R. 22.921(a) and (b). Based on its experience with that rule, however, the Commission concluded that any cross-ownership ultimately delayed the inauguration of service to the public. Pet. App. 4a-5a. In 1988, the Commission adopted rules prohibiting any cross-ownership of applicants for licenses to provide cellular service in rural areas, and prohibiting the prelicensing transfer of interests in rural license applications. See 47 C.F.R. 22.921(b), 22.922(a).

2. Petitioner was organized in 1983 for the purpose of applying to provide cellular communications services in various metropolitan service areas. Pet. App. 5a. Petitioner later decided to apply for licenses to serve rural areas instead. *Id.* at 6a. During 1988, petitioner sent its shareholders several notices concerning its new plans, and explaining the Commission's new filing rules prohibiting any cross-ownership of competing applicants for rural licenses. *Ibid.*; see 47 C.F.R. 22.921(b).

In 1984, Yerger Yandell, one of petitioner's shareholders, moved to a new residence without notifying petitioner of his new address. Pet. App. 5a. As a result of the move, Yandell did not receive any of petitioner's periodic notices to shareholders. *Id.* at 6a. At least one notice was returned to petitioner marked "Unable to deliver—no forwarding address." *Ibid.* Yandell's new residence was about three blocks from his old one, and he remained listed in the local telephone directory. C.A. App. 89.

In December, 1988, petitioner filed an application seeking authority to construct and operate a new cellular radio system in a rural service area designated Maryland 2, comprising much of southern Maryland and the Eastern Shore region. Pet. App. 6a.

At the time petitioner filed its application, Yandell owned a five percent interest in a competing applicant for the Maryland 2 license. *Ibid.* In November, 1989, petitioner's application was chosen in the Maryland 2 lottery. *Ibid.*

Following its selection, petitioner updated its shareholder mailing list and obtained Yandell's new address. Pet. App. 6a. Petitioner thereafter notified shareholders, including Yandell, that it had been selected in the Maryland 2 lottery. *Ibid.* Yandell then informed petitioner of his interest in a competing applicant for the Maryland 2 license, and petitioner in turn disclosed Yandell's cross-ownership to the Commission. *Ibid.* Shortly thereafter, another applicant for the Maryland 2 license filed a petition to deny petitioner's application, arguing that the application violated the rule against cross-ownership. *Id.* at 7a.

The Chief of the Commission's Mobile Services Division agreed that Yandell's dual interests violated the cross-ownership prohibition of 47 C.F.R. 22.921(b), refused to waive application of that rule in petitioner's case, and dismissed petitioner's application. Pet. App. 29a-33a. The Commission affirmed that decision, both on review of the Mobile Services Division order (*id.* at 24a-28a) and on later reconsideration of its own decision (*id.* at 18a-23a). The Commission rejected petitioner's argument that it did not intend to violate the cross-ownership rule, pointing out that while the rule is intended in part to deter speculation, "its underlying intent is to assist the Commission in processing applications quickly and efficiently so that service might be available to the public as expeditiously as possible." *Id.* at 21a-22a. In the Commission's view, the rule could not be

efficiently applied if a fact-specific analysis of intent were required. *Id.* at 22a.

The Commission also found no reason to waive a cross-ownership violation apparently caused by petitioner's error in "not diligently tracking [its] assorted potential cross-interests" (Pet. App. 22a), particularly in light of petitioner's ability to reach Yandell after it won the lottery (*ibid.*) and its failure to "show[] that it [had taken] sufficient affirmative steps to ensure that none of its shareholders had filed another application" (*id.* at 26a). Under the circumstances, the Commission concluded that granting a waiver to petitioner would "seriously undercut general compliance and enforcement efforts." *Id.* at 27a.

3. The court of appeals affirmed. Pet. App. 1a-17a. The court observed that the Commission's rules clearly prohibit multiple ownership interests in competing applicants, and that applicants have long been on notice that submitted applications are subject to dismissal, without any opportunity for curative amendments, if they contain any disqualifying defect. *Id.* at 3a, 12a-13a. The court concluded that in light of the Commission's experience with the more lenient cross-ownership rule applied to applications for cellular licenses in metropolitan service areas, the Commission had permissibly changed its rules to prohibit any cross-ownership among applicants for rural licenses. *Id.* at 8a-10a. In addition, the court held that the Commission did not abuse its discretion or deny petitioner due process when it refused to waive the cross-ownership rule. Noting petitioner's "failure to exercise due diligence in keeping track of its shareholders" (*id.* at 16a), the court upheld the Commission's ability to require strict compliance with its

rules when it permissibly concludes that waiver "would hinder the administrative process and * * * slow the provision of service to the public" (*id.* at 15a).

ARGUMENT

1. Petitioner's argument is based on the premise that the Commission and the court of appeals imposed "strict vicarious liability" on a wholly innocent corporation, in violation of the Due Process Clause of the Fifth Amendment. Pet. 7-13; see Pet. i. Petitioner does not explain its use of terms appropriate to the imposition of money damages for tortious conduct to discuss a regulatory agency's decision to promulgate and enforce strict qualification standards in the process of allocating access to scarce public resources. Leaving that point aside, however, the facts in this case do not implicate the question that petitioner seeks to present. As the court of appeals pointed out (Pet. App. 16a), "the Commission did not find [petitioner] completely blameless for the violation." See also *id.* at 22a, 26a.

The record supports that conclusion. At least one piece of mail sent to Yandell was returned to petitioner marked "Unable to deliver—no forwarding address," and petitioner admits that it knew Yandell had moved prior to the filing of its Maryland 2 application. Pet. App. 6a, 16a; Pet. 18. As both the court and the Commission noted (Pet. App. 16a, 22a), petitioner's ability to locate Yandell, who had moved only three blocks and who remained listed in the local telephone directory (C.A. App. 89), after winning the Maryland 2 lottery "suggests that it could have done so earlier to avoid a cross-ownership violation." Pet. App. 22a. Under the circumstances, the court of

appeals held (*id.* at 16a) that "the Commission could conclude that the company's failure to exercise due diligence in keeping track of its shareholders was at least partly to blame for the rules violation that resulted in the dismissal of [petitioner's] application." That proper and fact-bound determination does not merit further review, and obviates any need to consider petitioner's general arguments concerning "strict vicarious liability." *

2. Nor is any legal issue presented in this case concerning petitioner's entitlement to "clear and unambiguous notice of the requirements that must be met" in connection with license applications. Pet. 12. The court of appeals correctly held that petitioner received such notice. Pet. App. 12a-13a. As the court observed (*id.* at 12a), the notices petitioner mailed to its shareholders "indicate conclusively that [petitioner] had actual notice" of the cross-ownership rule, and the Commission's other rules and orders "also provided notice that applications would be subject to dismissal for failure to comply with the [Commission's] rules and regulations." See also *id.* at 3a-4a, citing *Cellular Lotteries (Further Reconsideration)*, 59 Rad. Reg. 2d (P & F) 407, 410 (1985), and 47 C.F.R. 22.20(a)(2).

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* Petitioner's challenge to the Commission's statutory authority to impose "vicarious liability" (Pet. 10-13), and its related argument that the Commission's rules are ambiguous with respect to the prohibition of cross-ownership and the consequences of a violation (Pet. 18-19), were neither presented to nor addressed by the court of appeals. They cannot properly be raised for the first time in a petition for review by this Court. See, *e.g.*, *Patrick* v. *Burget*, 486 U.S. 94, 99 n.5 (1988); *EEOC* v. *Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986) (per curiam).

Because petitioner had adequate notice of the Commission's rules and the likely consequences of any failure to comply with them, the court of appeals properly concluded (Pet. App. 13a-15a) that the Commission did not abuse its discretion by refusing to waive the cross-ownership prohibition or to allow petitioner to cure its violation after the fact. The Commission has reasonably determined that the requirement that license applicants be qualified at the time their applications are originally filed, without the time, expense, and complication of processing subsequent curative amendments, is critical to the Commission's efforts to expedite the cellular licensing process. See, *e.g.*, *Moving Phones Partnership* v. *FCC*, 998 F.2d 1051, 1057 (D.C. Cir. 1993), cert. denied, 114 S. Ct. 1369 (1994); *Progressive Cellular III B-3*, 6 F.C.C.R. 7178 (1991), aff'd mem., 986 F.2d 546 (D.C. Cir.) (Table), cert. denied, 114 S. Ct. 174 (1993). The Commission's strict application of its very limited criteria for waiver to the facts of petitioner's case (see, *e.g.*, Pet. App. 26a-27a) reflects a permissible balancing of competing policy concerns, and warrants no further review.

3. Finally, petitioner contends (Pet. 14-17), on constitutional (rather than statutory) grounds, that the cross-ownership rule is not rationally related to the achievement of legitimate Commission objectives. Even if we assume that that argument was properly presented to the court of appeals (compare Pet. App. 15a-16a; Pet'r C.A. Br. 42-47), it is insubstantial.

To begin with, petitioner has no constitutionally protected interest in having cellular licenses awarded according to any particular set of rules. Such an interest does not arise from an abstract need or desire for a benefit that might be conferred by the govern-

ment; it requires some legitimate claim of entitlement. *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). Such a claim may arise from rules or explicit understandings. See *Perry* v. *Sindermann*, 408 U.S. 593, 601 (1972). No such rule or understanding exists in this case. The Commission's rules and practices requiring strict compliance with the prohibition of cross-ownership apply to all license applicants. Moreover, even in the case of licenses already granted, this Court has recognized the clear congressional policy that "no person is to have anything in the nature of a property right as a result of the granting of a license." *Ashbacker Radio Corp.* v. *FCC*, 326 U.S. 327, 331 n.6 (1945), quoting *FCC* v. *Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940). As the tentative winner of a selection lottery, whose application was explicitly subject to subsequent review for compliance with all of the Commission's rules, petitioner has even less claim to a protected property interest. See, *e.g.*, Pet. App. 3a-4a; *Cellular Lottery Rulemaking*, 98 F.C.C.2d 175 (1984) (license issued only after review of application).

If we again assume that petitioner is entitled to challenge the substance (rather than the application) of the license selection procedures chosen by the Commission, its argument is addressed primarily to only one of the purposes of the cross-ownership rule, the deterrence of speculation in license applications. Pet. 14-15. As the court of appeals pointed out (Pet. App. 4a-5a, 14a-15a), however, the rule is also aimed at facilitating the delivery of cellular service to the public by eliminating delays associated with multiple ownership. As the court explained (*id.* at 4a), the Commission's experience with metropolitan area licensing led it to conclude "that allowing multiple

ownership interests of less than 1% in competing cellular applications encouraged applicants to enter into partial settlements whereby the applicants made mutual promises to convey a portion of their interests to other members of the settlement group upon being selected as the tentative selectee." *Ibid.* (footnote omitted). Such agreements not only involved speculation, but "delayed the inauguration of service to the public because they encouraged losing applicants to file petitions to deny the winning applications alleging that the tentative selectees were not the real parties in interest." *Ibid.* Petitioners suggest no adequate reason (see Pet. 16-17) for overruling the Commission's considered judgment, based on its experience and upheld by the court of appeals, that the cross-ownership rule is a rational means of furthering the Commission's goal of speeding the identification of appropriate licensees, and therefore ultimately the provision of services to the public.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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